

## Shell Offshore Inc.

An affiliate of Shell Oil Company

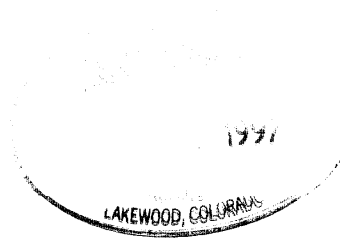


Exploration and Production  
Shelf Division  
Regulatory Affairs Department

PO Box 61933  
New Orleans LA 70161-1933

One Shell Square  
701 Poydras Street  
New Orleans, LA 70139

Direct Number: (504) 588-6982  
Direct FAX: (504) 588-4567



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### VIA AIRBORNE EXPRESS

Mr. David S. Guzy  
Chief, Rules and Publications Staff  
Royalty Management Program  
Minerals Management Service  
Building 85 - Denver Federal Center  
Denver, CO 80225

Dear Mr. Guzy:

RE: SHELL COMMENTS ON MMS PROPOSED POLICY FOR RELEASE OF  
THIRD PARTY PROPRIETARY INFORMATION IN ROYALTY APPEALS  
30 CFR PART 243, 62 FR 16116 (APRIL 4, 1997)

These comments are submitted on behalf of Shell Offshore Inc. and its affiliates, Shell Deepwater Production Inc., Shell Western E&P Inc. and Shell Frontier Oil & Gas Inc., hereinafter collectively referred to as "Shell".

The proposed MMS disclosure regulations are deficient and should not be finalized without republication and correction. The regulations fail to recognize that the release of proprietary and confidential information may be necessary to defend a claim even though it was not the basis on which the MMS order was formulated. MMS has proposed to provide for release only of material which the MMS itself has used to formulate the order. This process fails to recognize that appellants should also be able to use other Relevant Proprietary Information (hereinafter referred to as "RPI") to defend a royalty claim even though the MMS itself has not used the RPI as a basis of the order. The MMS proposal has unfairly limited the scope of the administrative record which is created for review and gives the agency the unfair advantage of defining the scope of the record which will go up on appeal. If the RPI disproves the MMS's case, then it is highly likely that the material would not be referred to in the record nor would the order be based upon it and the appellant would thereby be denied access to it. In short, the rule as proposed would allow the

MMS to make available for review only data which would presumably support the agency decision but would deny review of other RPI which the agency has not relied on even though it might be favorable to the appellant. This procedure is fundamentally unfair. It is tantamount to a denial of due process of law since it tips the scale in creating the administrative record for appeal clearly in the favor of the agency. The appellant lessee would be denied access to other relevant proprietary information which would be useful and relevant in presenting a defense of the claim itself. An amendment of the proposal should redefine RPI and describe a procedure in which an appellant would be afforded access to the confidential information for defense purposes even though the MMS has not relied on it for its order.

### **The Six Year Presumption**

MMS proposes that the mere passage of six years creates a presumption of non-confidentiality. This presumption is arbitrary. Confidentiality can only be determined on a case by case basis. For example, gas marketing activities today could involve longer term gas contracts which are price advantaged. Disclosure of that information can be competitively harmful to either the seller (lessee) or to the purchaser. The mere passage of time may not relieve all confidentiality concern. Although a ten year presumption may by the mere passage of time remedy some of those concerns, even in that case the regulation should provide for a notice of release to the provider of the confidential material to afford an opportunity to request that access to the material be denied. The balance to be achieved by the agency should require the lessee to be much more specific and particular in stating the reasons why the data remains confidential even after the passage of ten years. Stated another way, the provider of the information would need to be particularly clear in articulating reasons why the information should not be disclosed since the presumption would be that the passage of time has relieved much of the concern for confidentiality.

### **Agency Enforcement of Confidentiality Violations**

The regulation proposed and the commentary thereon does not clearly set out a penalty by the agency for violation of the confidentiality agreement. Instead, the recipient of the RPI appears to be vaguely liable for damages to the provider of the data which results from disclosure. In order to add more teeth to potential enforceability of the confidentiality agreement, the MMS should clearly state that disclosure of the information contrary to the agreement between the agency and the receiving party will constitute an offense subject to a civil penalty under MMS regulations subjecting the party disclosing to specific penalty process for each day of violation. Otherwise, the burden of enforcement is shifted to the party offended by disclosure when that party disclosed the information to the MMS as a requirement of law on the condition that MMS maintain its confidentiality. MMS is the party properly chargeable with enforcement of the condition to preserve confidentiality not the discloser. Any cause of action for damages resulting from disclosure would rest on independent provisions of state and federal law.

### **Expanding Time for Use of the Material**

The MMS proposal will not stop the appeals process of the agency denies access to the RPI. Although denial of discovery requests is not subject to the interlocutory appeal process under the Federal Rules of Civil Procedure, most federal district courts do provide for a review of a magistrate ruling on discovery to a federal judge. Since in practice the task of responding to requests for RPI will be delegated to MMS staff, some type of review process should be incorporated in order to protect the right of access. In ordinary civil proceedings, this is accomplished by an appeal to the federal district judge. MMS could accomplish this by an appeal to the Director. Expeditious handling should be provided and the time for filing response extended by the delay.

In addition, although the proposal deals specifically with denial of production of RPI there is no mention of how to handle the late receipt of RPI when responses and statement of reasons need to be filed. Since the agency should have already gathered and have at hand the RPI, the statement of reasons should not be required until a specified reasonable time period after receipt of RPI materials. Otherwise, the lessee appellant can be put in the difficult position of receiving RPI just a few days prior to a required filing date. In such case, the appellant would be denied a practical opportunity to review and benefit from receipt of the material.

### **Disposition of Confidential Material**

The regulations proposed return of the confidential material after the Interior Department has rendered a decision. Most confidentiality agreements in civil litigation contain an alternative provision which provide for certification of destruction of the confidential material. MMS should consider adding such a provision requiring destruction and certification thereof in lieu of incurring the addition cost of transport and storage or destruction by the agency itself.

### **Publication of a Confidentiality Form Agreement**

If the regulations are finalized, the MMS will in all likelihood formulate a model agreement on confidentiality if regulations are finalized. MMS is requested to publish that final agreement for comment in order to secure input from the regulated community. Variations from the confidentiality agreement form should be allowed to address particular circumstances.

### **Execution of Confidentiality Agreement**

Execution of the confidentiality agreement should not be restricted to a chief operating officer. Instead, the regulation should be altered to read "a chief operating officer or his designated representative". It is impractical to impose the obligation of execution of the agreement on such a high level corporate officer when leases, unit operating agreements, and other significant documents are executed by designated agents and attorneys-in-fact.

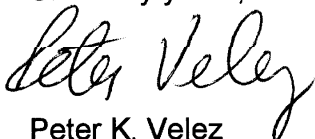
### **American Petroleum Institute Comments**

Shell has read and contributed also to the American Petroleum Institute comments filed on these regulations and with the exception of the above noted comments and emphasis also supports those comments.

### **Conclusion**

Shell urges the MMS to consider the above comments and to go to a republication of the regulation to remedy the procedural defects limiting the scope of the available administrative record. Publication of the form of the confidentiality agreement will also ultimately save time in execution of the agreement and will provide an adequate opportunity for input from the regulated community. *We are available to meet with the MMS to discuss any of these comments at their request. Questions should be directed either to myself at (504) 588-6982 or to Michael E. Coney at (504) 588-4643.*

Sincerely yours,



Peter K. Velez  
Regulatory Affairs Manager